

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA) CR No.: 3:09-715-JFA
)
v.) ORDER
)
WILIBALDO PONCE)
)
)
_____)

Pending before this court is the defendant's motion to vacate or correct his sentence pursuant to 28 U.S.C. § 2255. The government has responded in opposition to the motion contending that (1) the ground for relief constitutes a request pursuant to 18 U.S.C. § 3582 based on Amendment 750 to the Sentencing Guidelines; (2) the § 2255 petition is untimely; and (3) the defendant waived his right to lodge a § 2255 action with the exception of claims grounded in either ineffective assistance of counsel or prosecutorial misconduct.

Because defendant's Ground One rests solely on the claim that he should be resentenced in light of the Fair Sentencing Act, this motion could be considered as one for a reduction of sentence under § 3582. In the event that this court makes a merits ruling on the § 2255 motion as it now stands, any future motions under § 2255 by the defendant could be considered successive and subject to pre-filing authorization by the Fourth Circuit Court of Appeals. *See Slack v. McDaniel*, 529 U.S. 473, 485–489 (2000). Out of an abundance of caution, the defendant is directed to advise the court in writing within 14 days of this order whether he wishes to keep this action as one under § 2255 or refile it as a motion under § 3582.

IT IS SO ORDERED.

March 16, 2012
Columbia, South Carolina

Joseph F. Anderson, Jr.

Joseph F. Anderson, Jr.
United States District Judge